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IN THE

# Supreme Court of the United States

GEORGE DUNCAN,

*Petitioner*,

*vs.*

SHERMAN WALKER,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U. S. C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

properly implemented, will greatly reduce unnecessary delay in the enforcement of the criminal law. These changes would advance the rights of victims and society which CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

On June 16, 1992, Sherman Walker was convicted of robbery and sentenced, having pleaded guilty, in Queens County, New York. This is the conviction at issue in the present habeas petition. He also has two other robbery convictions in February of the same year. See Pet. for Cert. 3, 12a.

The June 16 judgment was affirmed by the state intermediate appellate court. It rejected as factually unsubstantiated a claim under *People* v. *Rosario*, 9 N. Y. 2d 286, 173 N. E. 2d 881 (1961), relating to disclosure of statements of prosecution witnesses. See *People* v. *Walker*, 628 N. Y. S. 2d 950, 951 (N. Y. App. Div. 1995). He further claimed that the police failed to contact an attorney who had represented him in an unrelated matter before placing him in a lineup. The appellate court rejected this claim on the grounds that the police have no obligations to make such a contact, given that defendant was represented at the lineup by another attorney appointed for him in this matter. *Ibid.*

The state high court dismissed Walker's appeal on January 5, 1996. *People* v. *Walker*, 87 N. Y. 2d 926, 641 N. Y. S. 2d 608, 664 N. E. 2d 519 (1996). The case became final under state law ten days later. See Pet. for Cert. 15a. The time to petition for certiorari expired, at the latest, Monday, April 15, 1996. Meanwhile, on March 18, 1996, the intermediate appellate court denied on the merits a coram nobis application based on alleged ineffective assistance of appellate counsel. *People* v. *Walker*, 639 N. Y. S. 2d 932 (1996). "According to appellant [Walker], he also filed a separate motion in February 1996 to vacate his conviction in state court, which denied the motion in April 1996." App. to Pet. for Cert. 2a. The President

signed the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, on April 24, 1996.[2]

On April 10, 1996, Walker filed in United States District Court a combined civil rights complaint against his attorneys under 42 U. S. C. § 1983 and habeas petition challenging his conviction in the June 16 case, as well as the two other cases. See App. to Pet. for Cert. 2a, 17a-18a. On July 9, 1996, the District Court dismissed the civil rights suit as frivolous, as "court-appointed lawyers do not act under color of state law within the meaning of § 1983." *Id.*, at 19a (citing *Polk County* v. *Dodson*, 454 U. S. 312 (1981)). The District Court also dismissed the habeas petition without prejudice because petitioner failed to show exhaustion by detailing the claims litigated in state court. *Id.*, at 20a.

Rather than seeking relief from this dismissal, Walker waited until May 20, 1997, and then filed the instant petition. *Id.*, at 12a. This petition attacked only the June 16 conviction on the two grounds considered in the original appeal: the *Rosario* claim and the failure to contact previous counsel before the lineup. *Id.*, at 11a. The District Court dismissed the petition as barred by the statute of limitations. *Id.*, at 15a-16a. The District Court further denied a certificate of appealability, finding no "substantial showing of the denial of a constitutional right." *Id.*, at 16a.

The Court of Appeals issued a certificate of appealability on the statute of limitation issues only. *Walker* v. *Artuz*, 208 F. 3d 357, 358 (CA2 2000). The court did not indicate any basis for believing that petitioner's underlying claims were even debatably meritorious, cf. *Slack* v. *McDaniel*, 529 U. S. __, 146 L. Ed. 2d 542, 551, 120 S. Ct. 1595, 1601 (2000), presumably because *Slack* was decided a month later.

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2. As we will discuss in part I, *infra*, the effective date of the statute makes the precise calculation of the finality date immaterial. By any calculation, finality predates the statute.

The Court of Appeals decided that the tolling provision of 28 U. S. C. § 2244(d)(2) included tolling for a prior federal petition. 208 F. 3d, at 360. As applied to this case, the statute would be tolled from the effective date of the AEDPA until dismissal of the first federal petition on July 9, 1996. Hence, the petition filed May 20, 1997, would be timely.

The State petitioned this Court for a writ of certiorari to resolve the split between this decision and the contrary decisions of other circuits, see *infra*, at 8, which was granted on November 13, 2000.

## SUMMARY OF ARGUMENT

Unless tolling applies, the last day to file a petition for a writ of habeas corpus in this case was April 24, 1997. Finality in this case precedes the enactment of the AEDPA. Under the rule of *Sohn* v. *Waterson*, pre-AEDPA petitioners had one year from enactment to file.

The language and history of the statute indicate that only state collateral petitions toll it. The argument of the Court of Appeals that "other collateral review" in 28 U. S. C. § 2244(d)(2) *must* refer to federal petitions cannot be reconciled with the use of nearly identical language to refer to state petitions in § 2263(b)(2). "Other collateral" was apparently added because, in some states, "post-conviction" refers to a specific procedure rather than a class of procedures. The complete absence of a tolling provision in the otherwise equivalent statute of limitation for federal prisoners further reinforces the conclusion that tolling is only for state petitions.

Legislative history confirms this interpretation. There is no indication that changes in wording during the evolution of the bill were intended to include tolling for federal petitions. The simultaneous appearance of "other collateral" in §§ 2244(d)(2) and 2263(b)(2) strongly implies it has the same meaning in both.

The purpose of the AEDPA is best served by not allowing tolling for prior federal petitions. To minimize delay and repetitive filings, petitioners who have claims that may or may not be exhausted should be encouraged to file them in state court first. The generous interpretation of tolling for state court filings in *Artuz* v. *Bennett*, coupled with denying tolling for unexhausted federal petitions, will encourage the proper procedure and reduce shuttling between state and federal courts.

Equitable tolling is available to mitigate the harshness of applying the above rule in circuits where the pre-*Bennett* precedents were contrary to the eventual outcome of that case.

## ARGUMENT

### I. Unless tolling applies, the last day to file a petition for writ of habeas corpus was April 24, 1997.

Before discussing the question of tolling, it is necessary to identify precisely the deadline in the absence of tolling. The statute provides:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus .... The limitation period shall run from the latest of—¶(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...." 28 U. S. C. § 2244(d)(1).

This language specifies both the date on which the "clock" starts and what the would-be petitioner must do to meet the deadline.

Prior to enactment of the AEDPA, finality on direct review was important for retroactivity. See *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6 (1987). *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994) defined finality for this purpose as "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari

has elapsed or a timely filed petition has been finally denied." The similarity of the statutory language to the *Griffith/Bohlen* rule implies that Congress had this date in mind. In any event, there is considerable practical value in having a single, well-defined date of "finality" for both retroactivity and § 2244(d)(1) and no compelling argument for a different method of calculation. A petition for writ of certiorari to this Court is not one of the state remedies that must be exhausted, see *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 149-150, n. 7 (1979), but the word "State" is conspicuously absent from § 2244(d)(1)(A). Cf. 28 U. S. C. §§ 2244(d)(2) (tolling), 2254(b)(1)(A) (exhaustion). The Court of Appeals applied this rule to Walker's direct appeal and calculated the finality date as April 14, 1996. *Walker* v. *Artuz*, 208 F. 3d 357, 358 (CA2 2000).[3]

This finality date predates the enactment of the statute of limitations. The general rule of construction for this situation was established in *Sohn* v. *Waterson*, 17 Wall. (84 U. S.) 596, 600 (1873). When the triggering event occurs prior to enactment of the statute, the clock starts upon enactment, and the moving party has the full statutory time from that date. As there is no contrary indication in the statutory language, the *Sohn* rule sets April 24, 1997, as the deadline for cases which became final before April 24, 1996. The Court of Appeals applied an equivalent rule in this case. See *Walker*, *supra*, 208 F. 3d, at 359.

The final preliminary point is precisely what the petitioner needs to do by the deadline to meet it. The answer is plain on the face of the statute. The limitation expressly applies to the "application for a writ of habeas corpus," which is synonymous with a "petition for a writ of habeas corpus." See Rule 2(a) of

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3. This calculation includes a ten-day period after the state high court decision, but see Supreme Court Rule 13.3, and overlooks the fact that April 14, 1996, was a Sunday. Cf. Supreme Court Rule 30.1. For the reasons discussed in the next paragraph, these issues are not material to the present case.

the Rules Governing Section 2254 Cases in the United States District Courts. The petition must be filed by the due date. This is consistent with Federal Rule of Civil Procedure 3, which provides, "A civil action is commenced by filing a complaint with the court." Prefiling actions, such as requesting counsel, do not constitute commencement. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 148, 150-151 (1984) (*per curiam*) (request for counsel and copy of "right to sue" letter did not constitute commencement of action for statute of limitation purposes); see also *West* v. *Conrail*, 481 U. S. 35, 38-39 (1987) (filing complaint is commencement in federal practice).[4]

Taken together, these rules require that Walker file his petition for writ of habeas corpus by April 24, 1997, unless tolling applies to extend that date. We now turn to the tolling question.

## II. The language and history of the statute indicate that only state petitions toll the limitations period.

*A. Language.*

The Antiterrorism and Effective Death Penalty Act, 110 Stat. 1214 (1996) added three statutes of limitation for collateral review of convictions. A one-year limitation applies to state prisoners in cases not subject to Chapter 154. See 28 U. S. C. § 2244(d)(1). A 180-day limitation applies to Chapter 154 cases. See 28 U. S. C. § 2263(a). A one-year limitation applies to federal prisoners. See 28 U. S. C. § 2255, sixth

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4. The Ninth Circuit's holding in *Calderon* v. *United States District Court (Kelly)*, 163 F. 3d 530, 540 (CA9 1998) (en banc), that a case becomes "pending" upon the filing of a request for counsel for the purpose of applying the AEDPA, has not been well received in other circuits. See *Williams* v. *Coyle*, 167 F. 3d 1036, 1039 (CA6 1999); *Gosier* v. *Welborn*, 175 F. 3d 504, 506 (CA7 1999); *Moore* v. *Gibson*, 195 F. 3d 1152, 1162-1163 (CA10 1999).

paragraph. The state prisoner limitations have tolling provisions, but the federal prisoner limitation does not:

> "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U. S. C. § 2244(d)(2).

> "(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; . . . ." 28 U. S. C. § 2263(b)(2).

In the present case, the Court of Appeals for the Second Circuit interpreted § 2244(d)(2) so that " 'State' modifies only the word 'post-conviction,' " *Walker* v. *Artuz*, 208 F. 3d 357, 359 (CA2 2000), "and the phrase 'other collateral review' . . . means federal habeas petitions." *Id.*, at 360. This limitation of the word "State" is contrary to the conclusions of the other circuits. Three circuits have rejected this interpretation on the very point at issue here. See *Grooms* v. *Johnson*, 208 F. 3d 488, 489 (CA5 1999); *Jones* v. *Morton*, 195 F. 3d 153, 159 (CA3 1999); *Jiminez* v. *Rice*, 222 F. 3d 1210, 1213 (CA9 2000). Three others have rejected it in the context of tolling for certiorari petitions. *Coates* v. *Byrd*, 211 F. 3d 1225, 1227 (CA11 2000) (tolling applies "only so long as the case is in the state courts"); *Rhine* v. *Boone*, 182 F. 3d 1153, 1156 (CA10 1999); *Isham* v. *Randle*, 226 F. 3d 691, 695 (CA6 2000) ("2244(d)(2) is drafted such that 'State' modifies 'postconviction or other collateral relief' ").

The notion that Congress used the word "other" when it meant "Federal" is odd, to say the least. Congress knows how to say "State or Federal" when that is what it means. See *Jiminez*, *supra*, 222 F. 3d, at 1213 (citing 28 U. S. C. §§ 2254(i), 2261(e), 2264(a)(3)).

The mainstay of the Court of Appeals' interpretation is its belief that "State post-conviction review" must necessarily

sweep in all forms of state judicial review of criminal judgments other than direct appeal. See *Walker*, *supra*, 208 F. 3d, at 360. From this premise, it concludes "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Ibid.*

While the premise might be reasonable looking at § 2244(d)(2) in isolation, it cannot be reconciled with § 2263(b)(2). That subsection also tolls for "*post-conviction* review or *other* collateral relief," and the tolling period ends with "the final *State court* disposition of such petition." 28 U. S. C. § 2263(b)(2) (emphasis added). Beyond question, this subdivision refers only to state judicial remedies. "State court disposition" of a clemency petition or a federal habeas petition would make no sense. Beyond question, Congress thought that the term "post-conviction review" might be interpreted as something less than fully inclusive of all state-court collateral reviews and thought that the term "other collateral" was necessary to preclude a narrower application of the tolling provision. If Congress believed this for § 2263(b)(2), there is no logical reason to doubt it also believed it for § 2244(d)(2). See *infra*, at 14 (simultaneous appearance of both provisions in legislative history).

The Court of Appeals is correct that the term "post-conviction review" *conventionally* refers to all forms of judicial attacks on criminal judgments after finality. See *Walker*, *supra*, 208 F. 3d, at 360. However, language changes with time and varies by place, and today the term sometimes, in some places, refers to a specific procedure rather than a broad category of procedures.

Florida is a case in point. In the wake of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the Florida courts adopted by rule a new collateral review procedure modeled on 28 U. S. C. § 2255. See *Gideon* v. *Wainwright*, 153 So. 2d 299, 300 (Fla. 1963) (on remand). The new procedure, which is now Florida Rule of Criminal Procedure 3.850, has come to be called a "motion for post-conviction relief." The contemporary usage

of this term is illustrated by this passage from *Knight* v. *State*, 394 So. 2d 997, 998-999 (Fla. 1981) (*per curiam*) (emphasis added):

> "We have for consideration a *petition for writ of habeas corpus* by Thomas Knight whose conviction and sentence of death were affirmed by this Court in *Knight* v. *State*, 338 So.2d 201 (Fla. 1976). We originally transferred this petition to the Eleventh Judicial Circuit and directed that it be *treated as a motion for post-conviction relief*. The trial judge in considering the petition properly determined that since petitioner's claim for relief is predicated on the assertion of ineffective assistance of appellate counsel, such relief can only be granted by habeas corpus in the appellate court unless it was caused by an act or omission of the trial court. The ineffective assistance of counsel allegations stem from acts or omissions before this Court, and therefore we have jurisdiction and will consider the petition for habeas corpus on its merits."

In Florida, then, "post-conviction relief" refers specifically to Rule 3.850, and habeas corpus is something else. The drafter of § 2244(d)(2) could legitimately have been concerned that if the tolling provision referred only to "post-conviction relief" it might be misinterpreted to not toll for a subsequent habeas petition such as Knight's. Language included to head off an anticipated misinterpretation may be redundant, but the canon of construction against superfluity ought not preclude such an interpretation. In drafting, as in engineering, redundancy can be a necessary safety measure, providing vital backup protection in the event that the primary structure fails.

Another problem with the Court of Appeals' interpretation can be seen by comparing the provisions for state and federal prisoners. The language added in the new sixth paragraph of 28 U. S. C. § 2255 is substantially the same as § 2244(d)(1), but the tolling language of § 2244(d)(2) is omitted entirely. As interpreted by the Court of Appeals, the state prisoner provision tolls for any previous federal petition dismissed for any reason,

not just for nonexhaustion. Is there any logical reason Congress would provide such tolling for state and not federal prisoners?

To illustrate, suppose two hypothetical prisoners, state and federal, file § 2254 and § 2255 petitions, respectively, only to see them denied on the merits a year later. Both then promptly file second petitions, which must face the formidable barriers to such petitions. Assuming they can surmount these barriers, if the Second Circuit is correct then the federal prisoner would be barred by the statute of limitations while the state prisoner would not. That makes no sense. Congress has pointed in the opposite direction by placing a lower hurdle for successive petitions by federal prisoners than for state prisoners. See 6 W. LaFave, J. Israel, & N. King, Criminal Procedure § 28.9(b), p. 136 (2d ed. 1999). A more generous remedy for federal prisoners is consistent with the role of § 2255 as the primary remedy for federal prisoners' claims outside the record, while § 2254 is a "secondary and limited," see *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983), backup to be invoked only when state remedies fail. This policy would be contradicted by a more strict statute of limitations for federal prisoners than for state prisoners.

A more sensible interpretation is that Congress omitted the tolling provision from § 2255 altogether because its subject matter is completely inapplicable to federal prisoners. That is, § 2244(d)(2) tolls for the sole purpose of allowing state prisoners to exhaust *state* remedies. Federal prisoners do not have that requirement and hence do not need the tolling.

The language of the AEDPA as a whole indicates quite strongly that the tolling provision is only for state judicial remedies which follow affirmance on direct appeal. The Court could very well stop at this point. See *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 222, n. 14 (1991). However, if resort to legislative history is thought necessary, further confirmation lies there.

*B. History.*

Legislative proposals for a statute of limitations have been considered for a number of years, see *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), but the movement took firm shape with the publication of the Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989), reprinted in 135 Cong. Rec. 24,694-24,698 (1989). This report is commonly known as the Powell Committee Report, see, *e.g.*, *Lonchar* v. *Thomas*, 517 U. S. 314, 328 (1996), because retired Justice Powell chaired the committee.

Under the committee proposal, which Senator Thurmond introduced as S. 1760, the clock started with the appointment of post-conviction counsel, see 135 Cong. Rec., at 24,693-24,694 (proposed § 2258(a)), which followed affirmance on direct review in state court. See *id.*, at 24,693, col. 2 (proposed § 2256(b)). Without a statute of limitation, states had been forced to the drastic step of setting execution dates for death row inmates who had not completed review of their sentences, as this was the only way to force them to the next stage of proceedings. See *id.*, at 24,697, col. 3. The limitation period was tolled for the certiorari petition on direct review but not state collateral review. *Id.*, at 24,698, col. 1. It was also tolled for state post-conviction review. *Ibid.* Tolling for a prior federal petition is not mentioned, and apparently no one ever thought that such a tolling rule would apply.

On February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitation for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995). It also added a statute of limitation for all habeas cases, not just capital cases in qualifying states. This limitation began upon finality of direct review, using the language ultimately adopted, and tolled the limitation "during the pendency of a properly filed application for State review

. . . ." *Id.*, at 2. "[T]he limitation period . . . would be tolled . . . in the course of state collateral review, and would run following the conclusion of state collateral review." *Id.*, at 17. The bill clearly did not contemplate tolling for prior federal petitions.

H. R. 729 modified the Powell Committee proposal by accommodating "unitary review" in states such as California, where the state habeas proceeding overlaps the direct appeal. See *id.*, at 6 (§ 2261(a)); see also *id.*, at 18 (California specifically cited as example of "unitary review"). Starting the clock with appointment of "post-conviction" counsel might have been workable in such states, as the statute would have been tolled during the pendency of "unitary review," see *id.*, at 5-6 (§§ 2258(2), 2261(c)), but it would have been awkward.

In the Senate, there followed "very extended negotiations" between Senator Specter and Senator Hatch. See 141 Cong. Rec. 15,018, col. 3 (1995) (statement of Sen. Specter). They finally agreed on, and jointly sponsored, S. 623, the Habeas Corpus Reform Act of 1995, which was later incorporated into S. 735. See *ibid.* This bill saw the debut of the language ultimately adopted for the Chapter 154 triggering event and for tolling in both chapters. The standard Chapter 153 statute of limitation began at the conclusion of direct review. See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing before the Committee on the Judiciary, United States Senate, S. Hrg. 104-428, 104th Cong., 1st Sess., 118 (1995). The special Chapter 154 limit began with finality in state court but was tolled during pendency of a certiorari petition. See *id.*, at 132-133.

In the committee hearing on S. 623, neither the committee members nor the witnesses indicated that the change in wording of these provisions altered the tolling. On the contrary, California Attorney General Dan Lungren, one of the major proponents of habeas reform, summarized the statute of limitation by stating, "One year for general habeas and 180 days for capital habeas, with tolling periods; that is, periods

where you don't count the time while they are going through State review or State collateral review." *Id.*, at 74.

In *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997), this Court found significance in the fact that the language making Chapter 154 retroactive appeared after that new chapter and the amendments to Chapter 153 had been combined in the same bill. An even stronger inference can be drawn from the fact that the terms "post-conviction" and "other collateral" appeared simultaneously in the tolling provisions of § 2244 and § 2263.

As H. R. 729 passed the House, both tolling provisions unambiguously applied only to state court proceedings and not to prior federal petitions. As proposed in S. 623 and as ultimately enacted, § 2263(b)(2) also unquestionably applies only to state court proceedings. See *supra*, at 9. The conclusion that "other collateral review" in § 2244(d)(2) refers to federal petitions would require two highly unlikely premises. First, one would have to accept that the drafter of the section intended to extend tolling where none of the prior proposals had extended it. Second, one would have to accept that the mechanism of this extension was the use of a phrase that is essentially identical[5] to a phrase placed simultaneously in another provision of the same bill, where it unquestionably does *not* have that meaning. Each of these premises is unlikely in itself. Together, they border on impossible. The history of the statute thus reinforces the most natural reading of the language, *i.e.*, that "State" modifies both "post-conviction" and "other collateral."

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5. The difference between "application for . . . review" in § 2244(d)(2) and "petition for . . . relief" in § 2263(b)(2) is not significant.

## III. The purpose of the AEDPA is best served by not allowing tolling for prior federal petitions.

The purpose of the legislation was stated in the committee report for the House version, H. R. 729. In broad terms, "the bill is designed to reduce the abuse of habeas corpus that results from *delayed* and *repetitive* filings." Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995) (emphasis added). A construction which encourages prompt filing and discourages repetitive filing therefore furthers the legislative purpose. Referring specifically to the statute of limitations, the report continued, "This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner." *Ibid.* There is no similar report for the Senate version, but the remarks of the sponsors on the floor indicate the same purpose. See 141 Cong. Rec. 15,019 (1995) (statement of Sen. Specter). An additional purpose was to bolster federalism and give renewed respect to state courts and the primacy of state remedies. See *id.*, at 15,037, col. 2 (statement of Sen. Nickles).

The imprint of these purposes shows clearly in the statutory language. The exhaustion requirement is strengthened by making it nondefaultable, 28 U. S. C. § 2254(b)(3), yet needless returns to state court are reduced by allowing dismissal on the merits of meritless but unexhausted claims. See § 2254(b)(2). The state court proceedings are made more meaningful by the abolition of *de novo* reconsideration, § 2254(d)(1), and by strengthening the requirement to develop the factual basis of the claim in state court. § 2254(e)(2). Repetitive filings are reduced by a strengthened successive petition rule. § 2244(b).

The statute of limitations provision, properly construed, fits snugly into the legislative purposes. It serves to reduce delay, reduce repetition, bolster the importance of state remedies, and yet keep the federal courthouse door open for the petitioner who diligently pursues state remedies and then files his federal

petition promptly upon exhaustion. The smooth flow of the case through each stage once, without backtracking, is encouraged by a generous tolling provision for state petitions and no tolling for an unexhausted federal petition.

Ideally, a convicted defendant makes all of his claims on direct appeal which can be made on the appellate record and all others in the first (and only) state collateral petition. Then he proceeds to federal habeas with fully exhausted claims. The real world, however, is not so tidy. Sometimes the exhaustion status of a claim is not clear. In *Castille* v. *Peoples*, 489 U. S. 346, 348, 351 (1989), the District Court concluded the claims had not been fairly presented to the state courts, the Court of Appeals concluded they had, and this Court concluded they had not. Three years after the federal petition was filed, see *id.*, at 347, this Court remanded for still further consideration of the state-law question of whether the claims were procedurally barred. See 142 Cong. Rec. 7798 (1996) (remarks of Sen. Specter) (criticizing this case).

The way to avoid the wastefulness of extended litigation over exhaustion is to encourage petitioners to file claims of doubtful exhaustion status in state court rather than federal court. The state court either decides the merits, clearing the way for federal review under § 2254(d), decides the claim is defaulted, requiring the petitioner to meet the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), or both, see *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989), requiring petitioner to clear both hurdles.

The path to this straightforward approach was cleared by this Court's generous interpretation of the tolling provision earlier this term in *Artuz* v. *Bennett*, 531 U. S. __ (No. 99-1238, Nov. 7, 2000). Some circuits had held that a state application was not "properly filed," and hence did not toll the statute, if it was untimely under state law. See, *e.g.*, *Dictado* v. *Ducharme*, 189 F. 3d 889, 892 (CA9 1999). *Bennett* held that procedural bars as to the claims in the application did not render the application itself improperly filed. See *Bennett*, 531 U. S. __

(slip. op., at 5-6). After *Bennett*, petitioners with claims of dubious exhaustion status can file them in state court and receive a state-court ruling on the state-law procedural bar question without fear of the statute running.[6]

The natural complement to *Bennett*'s encouragement to file these claims in state court is a discouragement to file them in federal court. That discouragement is provided by the statute of limitations, with no tolling for prior, dismissed federal petitions. The Court of Appeals in the present case said, "Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court." *Walker* v. *Artuz*, 208 F. 3d 357, 361 (CA2 2000). Unexhausted petitions may be "properly filed" in the broad sense of *Bennett*, but they are contrary to a strong, century-old federal policy, see *Rose* v. *Lundy*, 455 U. S. 509, 515-516 (1982), which Congress has vigorously reaffirmed in the very act in question here. See 28 U. S. C. § 2254(b).

While a habeas petitioner should not be "punished" for filing a federal petition with unexhausted claims in violation of this policy, as the Court of Appeals says, neither should he be rewarded. The general rule is that a dismissal of a case without prejudice leaves the plaintiff in, at best, the same position as if no suit had been filed. See *United States* v. *State of California*, 932 F. 2d 1346, 1351 (CA9 1991), aff'd, 507 U. S. 746 (1993); *Lambert* v. *United States*, 44 F. 3d 296, 298 (CA5 1995); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2367, pp. 323-324, and n. 12 (2d ed. 1995) (voluntary dismissal); 8 J. Moore, Moore's Federal Practice §§ 41.33[6][d] (voluntary), 41.34[6][f] (by stipulation), 41.50[7][b] (involuntary) (3d ed. 1998). As applied specifically to statutes of limitations, the general rule which applies in the absence of a saving statute is that the limitations period is not tolled by a suit which is dismissed. See *Willard* v. *Wood*, 164 U. S. 502, 523

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6. The problem of pre-*Bennett* cases in circuits which followed the contrary rule is addressed in part IV, *infra*.

(1896); *Alexander* v. *Pendleton*, 8 Cranch (12 U. S.) 462, 470 (1814).

> "In other words, a suit dismissed without prejudice is treated for statute of limitations purposes as if it had never been filed. [Citations.] Were this not the rule, statutes of limitations would be easily nullified. The plaintiff could file a suit, dismiss it voluntarily the next day, and have forever to refile it. The strongest case for the rule that the running of the statute of limitations is unaffected by a dismissal without prejudice is therefore the case in which the plaintiff procured the dismissal, as by voluntarily dismissing the suit. [Citations.] But that cannot place limits on the scope of the rule, since a plaintiff can almost always precipitate a dismissal without prejudice, for example by failing to serve the defendant properly or by failing to allege federal jurisdiction, even if he does not move to dismiss it. The rule is therefore as we stated it: when a suit is dismissed without prejudice, the statute of limitations is deemed unaffected by the filing of the suit . . . ." *Elmore* v. *Henderson*, 227 F. 3d 1009, 1011 (CA7 2000).

In habeas cases, the dismissal of the first petition for nonexhaustion leaves the petitioner in no *worse* position than if he had never filed it, as the successive petition rule does not bar his return to federal court after exhaustion. See *Slack* v. *McDaniel*, 529 U. S. __, 146 L. Ed. 2d 542, 551, 120 S. Ct. 1595, 1601 (2000). The other side of the coin is that the petitioner should be in no *better* position than if the first petition had never been filed.

The policy discussion in *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980) provides an informative comparison and contrast. That case involved a civil rights action under 42 U. S. C. § 1983 and the "borrowed" state statute of limitations. 446 U. S., at 484-485. Plaintiff had pursued a state court action first and then filed in federal court. *Id.*, at 481-482. The borrowed state limitation law had no applicable tolling provi-

sion, *id.*, at 486-487, and the question was whether this no-tolling rule was " 'inconsistent' with the policies underlying § 1983." *Id.*, at 487.

The *Tomanio* Court noted that the remedial policies of § 1983 were not adversely affected by refusing tolling, as plaintiffs had the ability to protect themselves by filing on time. *Id.*, at 488. This is also true in habeas, as discussed *supra*, at 16, where petitioners can protect themselves by going to state court first in all doubtful cases. Next, *Tomanio* noted that Congress had created § 1983 as an independent remedy, *i.e.*, not requiring exhaustion, and a no-tolling rule that effectively forbade consecutive litigation was not inconsistent with this choice. See *id.*, at 489. In habeas, Congress has expressly made the opposite choice and expressly provided the type of tolling denied in *Tomanio*. It is going straight to federal court that Congress has chosen to forbid, or at least severely restrict, and a rule that one who jumps the gun "litigate[s] at risk," *id.*, at 487, is entirely consistent with this policy. The fact that this rule will occasionally cause petitioners to lose the litigation is also entirely consistent with the policy of the statute as a whole, including its limitation period. See *id.*, at 488.

The Congressional policy is clear. Exhaust state remedies first, then and only then go to federal court. The policy is advanced by denying tolling for a prior, dismissed federal petition.

## IV. Equitable tolling is available to deal with harsh results in pre-*Bennett* cases.

The rule suggested in the preceding sections of this brief, in combination with the rule of *Artuz* v. *Bennett*, 531 U. S. __ (No. 99-1238, Nov. 7, 2000), lays out a clear path for petitioners to follow. That is, file all claims in state court first until they are clearly exhausted, even if arguably defaulted, and only then file in federal court. *Amicus* acknowledges, however, that this path was not clear before *Bennett* in some circuits.

Before *Bennett*, a prisoner in a Ninth Circuit state might not have filed in state court a claim he had not "fairly presented" to any state court, but which he believed was procedurally defaulted. Under *Dictado* v. *Ducharme*, 189 F. 3d 889 (CA9 1999), the clock would continue to run while the state court considered the "exhaustion" petition if it ultimately decided that the petition was untimely. Such a petition was not deemed "properly filed" after *Dictado* and before *Bennett*. See *id.*, at 892. With this state of the law, the petitioner would go ahead and file in federal court, trying to meet one of the exceptions to the procedural default rule. If the federal court disagreed with the petitioner's assessment of the state default rule, he could find his petition dismissed for nonexhaustion with no time to file another.

This is where equitable tolling comes in. There is a "rebuttable presumption" that equitable tolling applies to most statutes of limitation, see *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95-96 (1990), although it "is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U. S. 38, 48 (1998).

In most cases, equitable tolling for a prior federal petition would be inconsistent with at least the purpose, if not the text, of the statute. By providing tolling for state petitions, Congress has implicitly decided to exclude it for prior federal petitions. Cf. *Beggerly*, *supra*, 524 U. S., at 48 ("knew or should have known" language in statute precluded equitable tolling for plaintiffs who did know). The "already generous" nature of the state petition tolling rule, as construed in *Bennett*, further points away from piling on additional, court-created tolling rules. Cf. *id.*, at 49. Finally, to the extent that equitable tolling is deemed to reflect Congressional intent, Congress presumably acted with the awareness that "Federal courts have typically extended equitable relief only sparingly," *Irwin*, *supra*, 498 U. S., at 96, and that tolling principles "do not extend to . . . a garden variety claim of excusable neglect." *Ibid.*

Detrimental reliance on since-overruled precedent would seem to be one of the few occasions for this sparingly granted relief. It is analogous, at least from the petitioner's side, to the circumstance of the party misled by the other party. Cf. *Irwin*, *supra*, 498 U. S., at 96. Although tolling should not be allowed in this situation from the date of *Bennett* forward, it should be allowed to petitioners who relied to their detriment on contrary precedent in their circuits before *Bennett*. The purpose of the statute is to move these cases along, see *supra*, at 15, not to set "springes" for petitioners following the path apparently marked by then-controlling precedent. Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923).

In the present case, the Court of Appeals did not consider Walker's equitable tolling argument. See *Walker* v. *Artuz*, 208 F. 3d 357, 361-362 (CA2 2000). It seems highly unlikely he could qualify. "The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989) (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 466 (1975)). The reasons given by the District Court in its "reasonable time" analysis appear to preclude equitable tolling. Compare App. to Pet. for Cert. 15a-16a, with *Elmore* v. *Henderson*, 227 F. 3d 1009, 1013 (CA7 2000). Even so, that question should not be addressed initially in this Court but should instead remain open on remand.

## CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be vacated and the case remanded for consideration of the equitable tolling argument.

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Respectfully submitted,

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